Supreme Court, U.S.
FILED
JAN 3 1996
CLERK

No. 95-818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

MONTY J. REKDAHL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE

REPLY BRIEF FOR THE PETITIONER

Larry L. Simms
(Counsel of Record)
Thomas G. Hungar
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Alicia J. Bentley
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Attorneys for Petitioner

TABLE OF AUTHORITIES

Cases: **Page(s)**

Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., 155 Cal. App. 3d 381, 202 Cal. Rptr. 204 (1984) 4

Dunn v. HOVIC, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993) 5,8

Gilmore v. Superior Court, 230 Cal. App. 3d 416, 281 Cal. Rptr. 343 (1991) 6

Las Palmas Assocs. v. Las Palmas Ctr. Assocs., 235 Cal. App. 3d 1220, 1 Cal. Rptr. 2d 301 (1991) 4

Magallanes v. Superior Court, 167 Cal. App. 3d 878, 213 Cal. Rptr. 547 (1985) 4

TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) 8

Rules:

Cal. Evid. Code 452(a) & (h) 6

S. Ct. R. 14.1(g)(i) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-818

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

MONTY J. REKDAHL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE

REPLY BRIEF FOR THE PETITIONER

Respondents misapprehend the nature of the question presented in the petition. Instead of the evidentiary issue addressed by respondents, the question on which Owens-Corning Fiberglas Corporation ("OCF") seeks review is whether the punitive damages award imposed in this case is excessive in violation of the Due Process Clause. *See* Pet. i. That question was properly raised in the trial court, the Court of Appeal, and the Supreme Court of California. Respondents' contentions to the contrary are without merit.

1. Respondents devote considerable effort to their

discussion of an evidentiary issue resolved by the Court of Appeal. *See, e.g.*, Br. in Opp. 18-21. That issue involved the admissibility at trial of certain evidence pertaining to the deterrent effect of other punitive damages awards. In respondents' view, the trial court's exclusion of that evidence, and the asserted absence of other such evidence before the jury, indicates that the question presented in the petition was not properly preserved below.

Respondents' waiver argument rests on two assumptions: first, that OCF's due process claim presented in the petition is nothing more than a *per se* challenge to the constitutionality of imposing multiple punitive awards for the same course of conduct; and second, that OCF's due process claim cannot be considered by the courts unless evidence of prior punitive awards was presented to the jury. Neither of those assumptions is accurate.

As the petition makes clear, the question presented in the petition is whether the punitive damages award imposed in this case is unconstitutionally excessive in violation of the Due Process Clause. *See* Pet. i, 9-12. That question was clearly and explicitly raised by OCF in the trial court, in the Court of Appeal, and in the Supreme Court of California. *See* Pet. 4-7 (citing and quoting portions of record where OCF raised this issue).[1] It is therefore properly before this Court.

---

[1]Respondents make the bizarre assertion (Br. in Opp. 4 n.2) that it was somehow improper for OCF to quote the portions of its briefs where this federal question was raised below. Needless to say, respondents' assertion rests on a fundamental misunder-

[Footnote continued on next page]

Respondents misconstrue that question in characterizing it as nothing more than a claim that successive awards of punitive damages are *per se* unconstitutional. *See* Br. in Opp. 18, 21-25, 28. OCF's fundamental contention is that the punitive damage award is grossly excessive, and therefore violative of due process, in view of all the relevant factors presented to the courts below. Those factors include the evidence of OCF's compliance with industry and government safety standards (Pet. 10-11) and the obvious and undisputed potential for multiple awards of punitive damages arising out of the same course of conduct (Pet. 11). Those very same factors are also present in the *BMW* case, and are explicitly relied upon by the petitioner in that case as grounds for concluding that the punitive damage award at issue there is unconstitutionally excessive. *See* Pet. 10-11. The propriety of holding this case pending the disposition of *BMW* is therefore clear, because the Court's analysis of the excessiveness issue and of those factors in *BMW* could provide important guidance regarding the proper analysis of those same

---

[Footnote continued from previous page]

standing of this Court's Rule 14.1(g)(i). That Rule requires petitioners seeking review of state court decisions to provide pertinent quotations from the record "so as to show that the federal question was timely and properly raised." *Id.* Obviously, compliance with that Rule requires citation to and quotation from the pleadings in which the petitioning party asserted the federal question below. OCF fully complied with the letter and spirit of the Rule by citing to and quoting from its briefs below.

factors by the California courts.

Respondents also err in assuming that OCF's due process claim cannot be considered unless evidence of prior punitive damages awards was presented to the jury. In the first place, no such evidence was presented to the jury in the *BMW* case; indeed, no such evidence could have been presented, because no prior punitive damage awards had been imposed on the petitioner in that case. The factor relied upon by the petitioner in *BMW* is instead the obvious potential for multiple punitive awards in the mass tort context (*see, e.g., BMW* Pet. Br. 45-50); precisely that same factor is present in this case, as even respondents concede (Br. in Opp. 25).[2]

Second, evidence of the mass-tort nature of this case and the clear potential for massive damages awards

---

[2]Respondents' insistence on the presentation of such evidence to the jury appears to rest on the assumption that courts considering claims of excessiveness are precluded from considering matters not presented to the jury. The question of excessiveness is one of law for the court, however, not a factual issue for determination by the jury. For that reason, other California courts look to damage awards in other cases in considering whether a particular award is excessive, without regard to whether those other awards were presented to the jury at trial. *See, e.g., Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1259 n.9, 1 Cal. Rptr. 2d 301 (1991); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 393-96, 202 Cal. Rptr. 204 (1984); *see also Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 888, 213 Cal. Rptr. 547 (1985) (barring punitive damages in part based on counsel's statement "at oral argument that there are hundreds of [similar] cases pending nationwide").

was properly presented to the lower courts. OCF's motion for remittitur and new trial included excerpts from its 1991 Form 10-K showing *inter alia* that OCF had taken an $800 million charge against future earnings in that year alone to reflect the estimated *uninsured* cost of future awards in asbestos cases. *See* C.A. Rec. 3181 & n.3, 3202-05. In addition, material submitted to the trial court by *respondents* revealed that 85,000 asbestos claims were pending against OCF at the end of 1991. C.A. Rec. 3513.

OCF presented similar evidence to the Court of Appeal, and also identified for that court all of the punitive damages awards previously imposed on OCF in asbestos cases. *See* Pet. 3; OCF C.A. Br. 58-59 n.24 (citing 23 cases in which more than $49.5 million in punitive damages judgments had been entered against OCF);[3] *id.* at 57 & Addendum A (citing and attaching OCF's 1993 First Quarter Form 10-Q, which showed that OCF had taken an aggregate charge against earnings of $943 million to reflect the estimated uninsured costs of asbestos litigation through 1999); OCF C.A.

---

[3]Respondents err in suggesting that this total included amounts (such as the $25 million awarded by the jury in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993)) that had been reduced on appeal when OCF's briefs were filed below. To the contrary, the totals set forth in OCF's briefs did not include any remitted or reversed portions of the punitive damages awards at issue. Since the time those briefs were filed, of course, a few of these awards have been remitted or reversed, but many additional awards have been imposed on OCF; the current total is in excess of $100 million.

Reply Br. 28-29 nn.7-8 (citing an additional 15 cases in which punitive damages awards totaling more than $21 million had been imposed).

Respondents filed a motion to strike all references to this material from OCF's briefs, claiming that it was not properly before the Court of Appeal. OCF filed a response to that motion, explaining that, under California law, this material was the proper subject of judicial notice and was therefore appropriate for consideration by the Court of Appeal. *See* Opposition of OCF to Rekdahls' Motion to Strike Portions of OCF's Opening Brief at 5-11 (citing, *inter alia*, *Gilmore v. Superior Court*, 230 Cal. App. 3d 416, 281 Cal. Rptr. 343 (1991); Cal. Evid. Code § 452(a) & (h)).

The Court of Appeal did *not* grant respondents' motion to strike. Thus, OCF's showing of past punitive awards and the financial impact of asbestos litigation was properly before the Court of Appeal when it made its decision, and those matters are part of the record in this case. Respondents' waiver argument would therefore be incorrect on its own terms even if the issue of unconstitutional excessiveness were not a question of law for the courts to decide.

2. Respondents also err in attempting to deny the existence of evidence demonstrating OCF's compliance with government and industry safety standards. As OCF explained to the Court of Appeal, it began placing warning labels on Kaylo boxes in 1966, and revised those warnings in 1970. OCF C.A. Br. 68 (citing OCF Exh. AA-118; Tr. 2725-26, 2728). OCF knew that its Kaylo product contained a low percentage of asbestos and did not produce as much dust as other

asbestos products. OCF C.A. Br. 68-69 (citing OCF Exh. 985; Tr. 2288-89). As even respondents' experts conceded at trial, moreover, it was generally believed in the scientific community that asbestos products were safe if exposure levels were kept below the Threshold Limit Value ("TLV") established by the American Conference of Governmental Industrial Hygienists and adopted by several States, including Ohio (where OCF's headquarters are located), New Jersey (where OCF manufactured Kaylo), and California. OCF C.A. Br. 69 (citing Tr. 2145-48, 2270-72, 2297, 2300-01).

Laboratory tests of Kaylo performed in 1955 had shown no increased risk of tumorous growth at exposure levels far in excess of the TLV. OCF C.A. Br. 69 (citing Tr. 2291-97, 2303). Moreover, even respondents' expert conceded that between 1938 and 1968 a "reasonable body of medical authority" believed that installers of asbestos insulation products like Kaylo were, on average, exposed to levels of asbestos lower than the TLV. OCF C.A. Br. 70 (citing Tr. 2300, 2658-59). The same was true *a fortiori* for bystanders (like respondent Monty Rekdahl) who did not themselves work directly with asbestos insulation. OCF C.A. Br. 70 (citing Tr. 2300-01).

Studies conducted by third parties confirmed that the dust raised by the ordinary cutting and handling of Kaylo did not exceed TLV standards. OCF C.A. Br. 70 (citing OCF Exh. AA-62).[4] Indeed, respondents'

---

[4]Respondents claim (Br. in Opp. 4) that OCF did not conduct any of its own tests, but ignore the fact that tests conducted by outsiders showed that Kaylo could be manufactured and

[Footnote continued on next page]

own expert conceded that the accepted scientific literature was to the same effect. OCF C.A. Br. 70 (citing Tr. 2300). In short, OCF introduced substantial evidence of its compliance with contemporary government and industry safety standards, and respondents' contentions to the contrary are without merit.

3. As noted in the petition (Pet. 11-12), this Court's grant of a stay in this case demonstrates the propriety of holding the petition pending the Court's disposition of *BMW*. Respondents offer no basis for their contrary conclusion.[5] The fact that the ratio of punitive damages to actual damages in *BMW* is higher than it is in this case is beside the point, because this Court has already indicated that such ratios are not dispositive under the Due Process Clause. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993). Instead, the Court's resolution of the excessiveness issue in *BMW* is likely to turn in large part on its analysis of many of the same factors at issue here, and thus a remand for reconsideration of the judgment below will almost certainly be appropriate if

---

[Footnote continued from previous page]

handled without creating average asbestos exposures in excess of the TLV. Respondents point to a study conducted by Aetna in 1958 (*see* Br. in Opp. 27 n.14), but that study (which was in fact conducted for Owens-Illinois) showed that dust levels were below the TLV in most work areas.

[5]Nor do they even attempt to refute OCF's showing (Pet. 13-14) that the judgment below conflicts with the Third Circuit's decision in *Dunn v. HOVIC*. The existence of that conflict further demonstrates the certworthiness of this petition.

the Court resolves the excessiveness issue in favor of the petitioner in *BMW*.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held and then disposed of in light of this Court's disposition of *BMW of North America, Inc. v. Gore*, No. 94-896.

January 3, 1996

Respectfully submitted,

Larry L. Simms
(Counsel of Record)
Thomas G. Hungar
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Alicia J. Bentley
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Attorneys for Petitioner